INDEX

LIST OF AUTHORITIES—(Continued)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

TEXASTEEL MANUFACTURING COMPANY, ET AL,

Petitioners,

VS.

SEABOARD SURETY COMPANY,

Respondents.

Petition For Writ of Certiorari to the United States State Circuit Court of Appeals For The Fifth Circuit

---

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Texasteel Manufacturing Company, a Texas Corporation, George W. Armstrong, Sr., Allen J. Armstrong, George W. Armstrong, Jr., and Mary C. Armstrong, Petitioners, pray that a Writ of Certiorari issue to review the degree of the Circuit Court of Appeals for the 5th Circuit, entered on December 6, 1946, affirming the decree of the District Court of the United States for the Northern District of Texas, entered on May 2, 1945.

OPINION BELOW

The opinion of the Court below was filed on December 6, 1946; motion for hearing was seasonably filed and overruled on January 13th, 1947. The opinion is not reported and for convenience is printed as

BASIS OF JURISDICTION

an appendix to this petition and marked "Appendix A."

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Acts of February 13, 1925, 43rd Stat. 398 (28 U.S.C.A. Sect. 347) and under Supreme Court Rule No. 38, Sect. 5, sub. div. (b), as more fully set forth under "Reasons for Granting the Writ."

As stated, the opinion of the said Circuit Court of Appeals was filed December 6, 1946, and motion for rehearing was filed December 27, 1946, and order overruling said petition for rehearing was filed January 13th, 1947.

QUESTIONS PRESENTED

The controlling questions presented to said Circuit Court of appeals and in this petition are:

1. Whether a suit for Declaratory Judgment can be maintained against a corporation and the individual petitioners as guarantors of certain notes for a decree adjudicating the liability of petitioners to respondent on said notes where the liability, if any, has been fixed prior to such suit and where the only grounds for jurisdiction alleged in said declaratory proceeding was to enable respondent to determine its future course in purchasing the certificate of the trustee, issued for the operation of a plant on the performance of contracts of said corporation during the pendency of said reorganization proceeding.

2. Whether a suit for declaratory judgment under Section 400, Title 28 U.S.C.A. was properly rendered against such corporation involved in reorganization proceedings, declaring the liability of said corporation to respondent for principal, interest and attorney fees on certain notes, without pleading or proof that respondent's claim was filed in such proceeding, and without prior consent of the Bankruptcy Court in which such proceeding is pending.

3. Whether a suit for declaratory judgment could be maintained by respondent for the purpose of obtaining a decree absolving it from a claim of petitioners that respondent was liable by reason of duress on petitioners and for representations made to them by respondent's agents for the losses sustained in the operation of a certain shell manufacturing plant at Port Arthur, Texas, when the matter of such liability had been fixed by facts and circumstances which accrued long before such suit was filed.

4. Whether the burden on the trial of such declaratory proceeding was on respondent to prove its nonliability for such operation at Port Arthur plant, in view of the record showing the respondent alleged in its petition for such judgment that it was not liable as claimed by petitioners.

5. Whether the sole grounds for maintaining said suit for declaratory judgment, as alleged in respondent's petition, which was that it sought such judgment for the purpose of determining its future course

in purchasing trustee's certificate issued in said reorganization proceedings, had become moot, and whether the further grounds for such suit asking an adjudication of the liability of petitioners to respondents on certain bonds executed by them, to-wit: inperformance of certain contracts of said corporation with the Naval Bureau of Ordnance had also became moot; and whether such a situation rendered moot that part of suit for declaratory judgment, seeking a decree establishing the liability of petitioners on certain notes and an adjudication of nonliability on the part of respondent for the losses in the operation of the plant referred to.

6. Whether the evidence raised an issue as to petitioners liability for alleged duress of petitioners by respondent's agents, or for false representations to petitioners by such agents, inducing them to turn over the operation of the said shell making plant at Port Arthur, Texas, to a management committee resulted in a loss from such situation of approximately Two Million Dollars.

(NOTE: The substance of the evidence claimed by petitioners to raise an issue of fact being that at a time when certain contracts between said corporation and said Naval Bureau were not in default and shortly after said Bureau had made an agreement with petitioners to advance the sum of $880,000.00 to complete said plant, and for the operation of said plant by petitioners, and for the payment to the Navy of approximately $400,000.00, out of profits accruing from

such operation, and at a time when respondent had the power under certain escrow agreements made in March, 1942, to vote all the stock in both the Texas Steel Company and Texasteel Manufacturing Company, (individual petitioners owning all stock in both corporations), upon a declaration of default on the part of said Bureau to prevent such a declaration of default, and by voting such stock to deprive petitioners of all control over the affairs of said corporation, and at a time when respondent had the power under such agreement to prevent either of said corporations from exercising any of their corporate functions; that respondent's agent presented to petitioners a letter from said Naval Bureau, demanding that George W. Armstrong, Jr., Allen J. Armstrong, the former being a majority stockholder of both corporations, and John Foster, then Superintendent, be removed from any position of authority or responsibility in said manufacturing company. Said agent represented said letter to be a Navy demand, and when said petitioners refused to submit to such demand, respondent's representative threatened to use said power under said escrow agreements, and to take over said plants and vote said petitioners out of office in said company. Petitioners agreed to appointment of management committee as the only alternative to ouster from the affairs of said corporation; that after said committee was selected and placed in charge of the operation of said plant that its operations thereafter were completely dominated and controlled by respondent, resulting in a loss by negligent operation of said plant, in the approximate sum of Two Million Dollars.

7. Whether said escrow agreement created a fiduciary relationship between respondent and petitioners, and whether respondents violated same, by failing to notify petitioners, on June 2, 1942, when its witness claimed that said Naval Bureau demanded that respondent's agent go to Texas and remove said individual petitioners named, from any position of authority or control of affairs of said corporate petitioners, and thereafter presenting said letter to said petitioners, and threatening to use the power vested in respondent by said escrow agreements resulting in the taking over by respondents of the control of said plant with the resulting losses as stated.

8. Whether the evidence raised an issue of fact as to estoppel of petitioners of said claim of duress and fraud, where an issue was raised by the evidence that the same conditions continued and existed during the period of the operation of said plant, which resulted in petitioners surrendering such management, and whether under such circumstances any estoppal could exist.

9. Whether the trial court erroneously held that the individual petitioners were liable as principals for said notes described in the respondent's petition in the trial court, and that the liability of said individual petitioners on said notes was based upon the execution of the several contracts of guaranty, written on the back of each of said notes, and the application signed by the individual petitioners as sureties for said corporate petitioner to respondent was not a contract of idemnity for the payment of said notes.

STATEMENT OF FACTS

Respondent brought this suit for declaratory judgment:

a. For decree fixing the liability of petitioners on certain performance and advance payment bonds executed by petitioners as surety for the performance of certain contracts between the corporate petitioners and the United States Bureau of Ordnance made in 1941 for the manufacture of shells for the Navy.

b. To obtain such a decree adjudging the validity of trustee certificates issued in a certain reorganization proceeding involving said corporate petitioners.

c. To establish the liabiliay of petitioners for the principal interest and attorneys fees on three promissory notes, one executed by said corporate petitioner as principal and certain of the individual petitioners as guarantors and two notes for $100,000.00 each; and

d. To secure an adjudication that respondent was in no way liable for the operation of certain facilities plants for the manufacturing of shells for the Navy under the contracts above referred to but that the operation was conducted by petitioners' agents (Para. R.29).

The trial court overruled petitioners' motion to dismiss. (R. 100, 101, 172, 177); and sustained re-

spondent's motion to strike a part of paragraph 11 and paragraphs 14, 21 and 26 of petitioners' answer. (R. 162, 147, 148).

The case was tried upon the theory that any evidence, whether it was hearsay or otherwise, was admissible to show what was in the mind of the members of the Naval Bureau, and petitioners were not allowed to introduce any contrary evidence as to the truth or falsity of the testimony concerning the conversations and the letters written by the members of said Naval Bureau.

The trial court instructed a verdict in favor of respondent upon which judgment was entered. In his charge to the jury, the court gave as his sole reason for instructing the verdict, that it was of the opinion that the Navy had the right to act as it did, that is, to have removed individual petitioners from the control of their business without cause. The instructions of the jury being oral (R. 147, 997), the question of liability of respondents as surety on said performance and advance payments bond and as to liability for trustee's certificate had become moot.

(NOTE: Appendix B to this application showing that respondent's liability as surety on the bond NOrd. 153, 171, 150 and NOD 2350 had been fully discharged and that the trustee's certificates, purchased by respondent, had been either paid or refinanced, and that no liability any longer exists as to respondents liability with respect to either of said matters.)

The Evidence As to the Contract Between Respondent and Petitioners

In as much as the action of the court in instructing a verdict cannot be reviewed without a consideration of the evidence, as brief a statement as can be made of the substance of the material facts will now be made. These facts will be stated more in detail in the supporting brief, under statement of the case. The individual petitioners owned all of the stock of the two manufacturing corporations, Texas Steel Company and Texasteel Manufacturing Company, and in 1941 were devoting said facilities solely to the manufacture of shells for the Army. Upon the earnest solicitation of representative of the said Naval Bureau, the corporate petitioners were induced to enter into the contracts numbered above in 1941, for the manufacture of shells for the Navy, and upon representations that if said company would build a combined steel mill and facilities plant for the manufacture of shells at Port Arthur, the same would be financed by the Government. Petitioners agreed to install said plants at cost. Prior to October 14, 1941, the date of the signing of the contracts for the facilities NOrd 2350, and in order that delay in beginning operations so badly needed by the Navy should not be delayed, it was agreed that advancements would be made on said supply contracts, and that a combined steel mill and shell making plant should be erected. Petitioner corporation was induced by the Navy to buy certain equipment from it at a cost including dismantling and shipping, of approximately $125,000.00. The sum of $585,000.00 was advanced by said Bureau and the

work on said plants begun (R. 563, 575, Def. Ex. 1 to 15 inclusive, R. 556 to 559 inc. 568, 569, 570, 574, 620, 426, 627). Plans were approved by the Bureau without consulting the petitioners. (R. 626).

By letter dated October 4, and letter dated October 6, 1941, the times for execution of said contracts were extended by said Bureau in consideration of the reduction of prices agreed to in said contracts, in the sum of $130,125.00. The Navy agreed to finance the facilities plant in which to perform said supply contracts and said contracts were thereby extended to October, 1942. Appendix D to petition. Plaintiff's Ex. 1, 6 and 11 (Original sent up with record) (R. 183, 187). In January, 1942, the work was suspended on account of the fact that the funds had been expended. Plans for the facilities plant were found to be inadequate and the steel mill was abandoned. The Bureau requested that revised plans be submitted, which was done. Machinery owned by the Navy and sold to petitioners was insufficient and contributed to the delay (R. 593, 594 R. 556 to 577 inc. Def. Ex. 5, 6, 7, 8, and 9).

To secure the advance payments in the sum of $585,000.00, Respondent executed a surety bond for such advance payments by the Navy. On March 26, 1942, petitioner executed to Respondent indemnity agreements as a condition for the issuance and delivery of said advance payments bonds. Respondent required that said stockholders, as additional security, pledge all the stock owned by them in both of said

corporations and said stock was placed in escrow. The condition of the pledge being that all of said stock be deposited with the First National Bank of Fort Worth, and upon written statement of the surety company that either of said companies, or their officers or stockholders were interfering in any way with respondent's right to vote said stock as provided in said agreement, that said shares of stock should be delivered to respondent, or if respondent stated that it was foreclosing on said stock and had notified such stockholders, or upon the event that the United States Government, or any branch department, or agent, thereof, had declared a default on either of said contracts, or called upon said surety for the performance under any bonds executed to it, or in the event said Government, or any department thereof, should advise respondent that change in management, supervision or policy was necessary, in order to obviate the declaration of default; then, in either of said events, said surety company could assume full authority and right to vote said stock of all stockholders and elect officers and directors, and otherwise exercise in full, stockholders rights to direct the affairs of said corporation. At the same time, another indemnity agreement was executed by petitioners, which provided, that each and every action of either board of directors of either of said companies would be with the advice and consent of a representative of respondent who was to be present at all stockholders meetings, and that each and every action of the stockholders or directors of either of said companies, should be tenative only, until approved by re-

spondent. (Plaintiff's Ex. 19, and 20-R. 217, 238). Copies of this agreement were submitted to said Bureau and respondent tentatively agreed to be guided by said Bureau in the exercise of such rights. (R. 333, 334). Revised plans as required by the Navy were submitted by April 1st. After these revised plans were submitted and tentatively approved, on April 5 or 6, 1942, Allen J. Armstrong and George W. Armstrong, Sr., met with the members of said Board. George W. Armstrong, Sr. offered to abandon the project and would account for the funds advanced up to that time (R. 604). This offer was not accepted by the Navy but an agreement made that work would proceed under the new plan calling for an expenditure of $880,000.00, to be furnished by the Navy on condition that petitioners would reimburse the Navy for all expenditures in excess of One Million Dollars, out of one-half of the profits for said contract. (R. 632). Delay in building the plant was also due to defective plans approved by the Navy, without notice to petitioners. Briefly, the evidence showed that the contracts were not in default; that there were no grounds existing for removal of petitioners; that the Navy had in April, 1942, committed itself to the completion of the facilities plant, and the operation of it by petitioners, in the performance on the supply contract as numbered above.

Evidence Relating to Duress and Fraud

Respondent's witness, O'Neil, testified that on June 6, 1942, he was informed by Admr. Blandy, of said Bu-

reau, that no approval of additional facilities under the contract would be made unless petitioners George W. Armstrong, Allen J. Armstrong and John Foster, sever their connection with the company, to which witness demurred, stating it was not necessary. Blandy thereupon instructed him to go down there and get rid of them, and witness said he did not want to do it, and the Admiral replied, "Go down there and chop their heads off." And added that respondent, as a surety, had the right to do that, to which witness replied that it did not have. (R. 220, 221). Then witness required a letter of instructions, which Blandy wrote, dated June 5, 1942. (R. 222, 223). Said witness objected to the form of said letter, and said Blandy then wrote another letter dated June 6, in which he stated that said Bureau did not consider the said Armstrongs and Foster acceptable to occupy offices in performance of said contract, and further stated, that before final authorization and approval of additional facilities, the Bureau wished to be advised that Respondents had placed in effect an acceptable organization. (R. 226, 227). Said witness O'Neil brought this letter to Texas and informed George W. Armstrong, Jr., of its contents, and of what happened at the conference on June 2, and that this letter was a Navy demand. When Allen J. Armstrong and George W. Armstrong saw said letter they refused to accede to said demand, and they stated that they would rather let the Navy close up the plant than accede to said demands. (R. 303, 304). That they were informed that the Navy would immediately demand further payments, and said O'Neil stated to

Allen J. Armstrong, that if the Armstrongs persisted in their refusal, then it would put respondent in such position that it would leave it no alternative but to exercise its right under the escrow agreements, which was the right to take over and run the stock and vote the Armstrongs out of office. (R. 606, 607). George W. Armstrong and Allen J. Armstrong testified they agreed to the appointment of a management committee as the only alternative to ouster from the affairs of said corporations. (R. 667, 613, 953). A management committee was agreed to and said O'Neil and George W. Armstrong, Jr., were appointed as members of said committee, and the two Armstrongs referred to, agreed to take no further part in the operation of said Port Arthur plant. This was done shortly after June 13, 1942. Resolutions of stockholders and directors of said corporation were passed appointing said committee. Respondent in writing asked that it be permitted to name two representatives on the Board of Directors of said corporation. (R. 610-11, 812).

On April 13, 1944, corporate petitioners delivered stock certificate No. 15 to George Thompson, Jr., attorney for respondent; certificate No. 16 to H. W. Rudolph for its general counsel; and certificate No. 17 to Howard Hyland an employee of respondent. Each of said certificates being one share of stock in order to qualify the local attorney, the general counsel and the said Hyland, agent and employee of respondent as directors in said corporate petitioner. Said Hyland having no connection with the affairs of said corporate petitioner except by direction of respondent.

Attention is called to Def. Ex. 35 (R. 818) and it will be noted that said letter, dated June 5, 1942, referred to a recent meeting in Admr. Blandy's office, and that a demand had been made that Foster resign as an officer and director of Texasteel Manufacturing Company; nothing is said in this letter concerning a demand as to George W. Armstrong, Sr., and Allen J. Armstrong, and certainly at that time, respondents should have given them notice of Admr. Blandy's attitude.

Respondent Was Responsible For the Operation At Port Arthur After June 13, 1942

O'Neil, Agent, and George Thompson, attorney for respondent, were placed on the Board of Directors of said corporation and reported all action of said board to the respondent. (R. 322). On June 24, 1942, O'Neil wrote that respondents were willing to accept the responsibility of management of Port Arthur Plant. (Ex. 25, R. 629). After the appointment of said comcommittee, George W. Armstrong, Jr., continued to run the steel mill at Fort Worth and went to Port Arthur for a while, a couple of days a week. (R. 265). Soon after said committee was appointed, another agent of respondent, one Hyland, was sent to Port Arthur and put in charge of the disbursements of all funds. (R. 402, 738). O'Neil left Port Arthur in December, 1943, and Hyland without an appointment from corporate petitioner, succeeded him (R. 738-740) and continued in the same capacity until the

trusteeship (R. 269, 740). Rudolph, general counsel for respondent, admitted July, 1944, that the Navy in 1942 had put the responsibility for the operation of said plant on respondent. (R. 637).

Rudolph selected the personnel of the management committee after resignation of George W. Armstrong, Jr. He selected Alverson. (R. 863). O'Neil requested that R. C. Armstrong be sent to Port Arthur (R. 735), and then had Alverson and R. C. Armstrong appointed on said committee. George W. Armstrong, Sr., suggested that R. C. Armstrong be made sole manager. Rudolph vetoed this. (R. 738, 739, 740). Alverson resigned in May, 1944, and Rudolph put R. C. Armstrong in charge of said plant. (R. 739). He remained in charge until August, 1944; after Alverson left R. C. Armstrong asked Allen J. Armstrong to come to Port Arthur and assist him. Allen J. Armstrong refused unless requested by respondent. R. C. Armstrong then contacted Rudolph, and the latter requested said Allen J. Armstrong to go to Port Arthur and assist, which he did. The Navy wrote a letter, in order that said Allen J. Armstrong might comply with Rudolph's request. (R. 649). R. C. Armstrong stated to the Navy Bureau, in the presence of Rudolph, that he was operations consultant for respondent, at said Port Arthur plant. Lt. Bowers, resident inspector for the Navy at said plant, from July 29, 1942, testified that after R. C. Armstrong came to Port Arthur, he installed a different system, and that the record of progres, in both quality and quantity, had incresaed, both consistently and materially, from

the time R. C. Armstrong went to Port Arthur in 1943. (R. 726). The actual production of shells in the late part of 1943 was approximately 5000 shells per month, that the rejections amounted to approximately fifty to seventy-five per cent; that by the 25th of February, 1944, after R. C. Armstrong had been in charge since November, 1942, the percentage of rejections declined to twenty-five per cent, and by August had declined to approximately fifteen per cent. The production had been built up to approximately 1000 shells per day. (R. 728, 743). Revised Contract NOD 2350 was executed after George W. Armstrong and Allen J. Armstrong were removed in June, 1942, and plant completed.

Evidence Relating ot False Representations by Respondent's Agent to Petitioners

Reference is made to the testimony above referred to, to the effect that said letter of June 6, 1942, was a Navy Demand. Robert McKinney, respondent's witness, testified that he was present at said conversation on June 2, and was asked whether said Blandy told O'Neil to "go down there and get rid of them." He answered that Blandy indicated that no further advances could be made unless the management was improved. (R. 527). The report of said McKinney to the Navy, introduced by respondent, stated that on June 1, 1942, respondent had taken over the stock of said corporation and placed George W. Armstrong, Jr., in charge of operations. (R. 926, 931). In 1944, Allen J. Armstrong appeared before the Naval Bureau, after the plant had been operated by the man-

agement committee beginning in 1943, and was asked by members of said Bureau as to why the operations at Port Arthur were in such a state. He stated he had been ousted by the Navy and, therefore, had not had anything to do with the operations. Some members of the committee expressed surprise and disclaimed any responsibility of the Navy. (R. 613). On August 22, 1944, said Bureau wrote corporate petitioner and denied that the operation of the management committee was forced on petitioner by the Navy Bureau; that any charge to that effect was without basis, as reflected by the clear records of the Board, and further stated that at the request of respondent, said bureau indicated to respondent that it did not consider the said Armstrongs competent persons to be active in the management of said Port Arthur operations, and that the personnel of the management committee established in 1944, was the result of the acts of the Surety Company and corporate petitioner. (R. 290, 293). Thereafter, George W. Armstrong, Sr., wrote respondent three letters asking for an explanation of this matter and these letters were referred to Rudolph and neither of them was answered. The reason given was that said Rudolph did not care to have any correspondence or dealing with Judge Armstrong. (R. 394, 613, 667, 952, 953).

Evidence As to Failure of Respondent to Advise Petitioner As to the Navy's Attitude After April, 1942

Petitioners were not advised of the facts with respect to the negotiations between said Navy Bureau

and respondent leading up to letter of June 6, 1942. (R. 259, 264, 265, 389). Letter written by said corporation was without notice of the letter of said Bureau of May 21, 1942. (Ex. 22, R. 817; Ex. 23, R. 628; Ex. 22, R. 390, 483). The letter of June 5, (R. 222, 223), not shown to petitioner, nor information of its contents given to them until after the appointment of said management committte. (R. 263, 264). Petitioners did not refer said Bureau, nor any of its members, to the Army Officers with whom petitioners were dealing, and who could give first hand information as to the honesty and competency of George W. Armstrong and Allen J. Armstrong, as well as John Foster. (R. 274). If the Naval Bureau had been referred to the representatives of the Army they would have been informed that Allen J. Armstrong was in charge of the operations of corporate petitioner in performing shell contracts for the Army and that the performance of said contract had been in all respects satisfactory. (R. 440, 443, 949). The charge to the jury informed them that there was no issue as to the honesty of the Armstrongs; that the court had known them a long time and that there was nothing to show that they were not honest and capable businessmen. (R. 1002). In addition, as shown above, there is nothing in this record which shows that the said Armstrongs were in any manner negligent or incompetent, or responsible for the delay in beginning the manufacture of shells. The initial agreement was that said shell plant was to be financed by the government. Petitioners used something over $200,000.00, of their own funds in order to expedite the work. The plans drawn

by Byster and Company were approved by the Navy without consulting or without other notice to petitioners. The machinery sold by the Navy to petitioners to be used in said plant were defective. In October, 1941, the Navy made a new agreement, in which it agreed to finance a shell making plant in which to perform said contract. Petitioners abated the contract price and the contracts were extended. See Appendix D to this Petition. There is nothing in this record to substantiate the charge that the delay in beginning actual work of manufacturing shells should be laid at petitioners' door. No reason for this charge was ever given so far as the record shows. The demand referred to was arbitrary.

The liability of the individual petitioners for the payment of the notes described in plaintiff's petition resulted from a contract guaranty, written on the back of each of said notes. (Plaintiff's Ex. 48, R. 498; Ex. 49, R. 500; Ex. 50, R. 502; Ex. 51, R. 504). Letter to George W. Armstrong (R. 624, 635, 426). Testimony of Thompson (R. 307, 308); and all stating George W. Armstrong was guarantor.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals that the District Court had jurisdiction to render judgment against corporate petition while involved in reorganization proceedings and to adjudge its liability on the notes sued on is in conflict with decisions of other circuits. *Moore v. Scott*, 55 F. 2d 863

(9th Cir.); *Hanna v. Bricton Mfg. Co.*, 60 F. 2d 139 (4th cir.); and *Silverberg v. Ray Chain Stores Inc.*, 54 F. 2d 650. It was held that in all three cases last cited, that after a Bankruptcy court had supervened, no other court has power or authority to partially administer or deplete the estate, not even in favor of its own receivers. It is also in conflict with *U. S. Fidelity and Guaranty Co. v. Bray*, 225 U. S. 209, wherein it was held that United States District Court sitting in equity, could not decree an equitable right to have funds in the hands of the trustee in Bankruptcy, applied to certain labor claims for which plaintiff was liable as surety. The same rule applied to reorganization proceedings under the Chandler Act. *In Re Plankington*, 138 F. 2d 221.

It has been held that where such reorganization proceedings have been instituted and allowed, that it excludes the jurisdiction of the Board of Tax Appeals. *Mally Etc. Inc. v. C. I. O.*, 38 B.T.A. p. 1; *In Re Nor Cor Mfg. Co.*, 109 F. 2d 407 (cert. denied). It was held that *Sect. 356, Title 11 U.S.C.A.* the Bankruptcy Court has sole jurisdiction to allow claims and may exercise its equitable power in allowing the amounts thereof. Under the Texas law, the provision in a note for attorney fees is a contract of indemnity, and court may allow less than the amount stipulated. *Inman v. Tex. Land & Mfg. Co.*, 78 S. W. 2d 1032; *Grover Bonner Lumber Co. v. Freeman*, 33 S. W. 2d 218; *Delora v. Furnish*, 46 S. W. 2d 402; *Kansas City Life Ins. Co. v. Duvall*, 129 S. W. 2d 770. If the judgment is affirmed, the Bankruptcy

court will be deprived of its jurisdiction over the claim of Respondent against said company, and its only function will be a mathematical calculation.

The holding of the court is also in conflict with the decision of the same court affirming *Wernor Millinery Co.*, 1 F. 2d 385 and 1 F. 2d 377, in which it was held that claims could not be entered against the Bankrupt estate subsequent to six month period. There being neither allegation nor proof that respondent's claim or any part thereof had been filed in reorganization proceedings.

2. The decision of said Circuit Court, that respondent's suit presented a proper case for declaratory judgment, is in conflict with *Angle v. Schram*, 109 F. 2d 380. In that case it was held that where the rights of the parties had been fixed prior to the bringing of the suit for declaratory judgment, that such proceeding was not appropriate for declaratory decree. See, also, *New Discoveries v. Wisconsin Alumni Ass'n.*, 13 F. Supp. 596; *1 C.J.S. 117*, P. 1010; *Duart Mfg. Co. Ltd. v. Philadelphia Co.*, 31 F. Supp. 549; *Aetna Life Ins. Co. v. Hayworth*, 300 U. S. 227.

3. The case is of such importance as to justify the granting of a writ, in that a suit involving more than $500,000.00, petitioners were denied their constitutional right to a trial by jury when the evidence under applicable prevailing state law raised an issue of fact as to whether petitioners were under duress of respondent's agents, and were also induced by false representations of said agents, to agree to

permit the management of the Port Arthur plant, and the performances of the contracts by a management committee, which was controlled by respondent, and which operation resulted in in more than One Million Dollar losses. The facts under Review in the instant case require the application of State Law, the affirmance constitutes a failure to apply the decisions of the State Court governing the sufficiency of the evidence to raise an issue of liability. *Stoner v. New York Life Ins. Co.*, 311 U. S. 464; *Cooper v. Brown*, 126 F. 2d 874; *Prudence Realization Corp. v. Ferris*, 323 U. S. 650; *Guardian Trust Co. v. York*, 326 U. S. 99; and is of such importance as to justify the granting of the writ.

The rule prescribed in *Ward v. Scarborough* (Com. App.) 236 S. W. 434, as applied to the evidence, required the issue of duress to be submitted to the jury. Respondent had the power to take over and vote the stock of both companies and remove petitioners from all control thereof, but no legal right to do so as the contracts were not in default, and delay in beginning performance was not attributable to them. The Bureau, just prior to the demand, and in April, 1942, had made a new agreement with petitioners for the operation and completion of the plant in question. Respondent's agent threatened to exercise its power under said agreement, and petitioners consented to the appointment of a management committee to prevent complete control of said corporation being taken over by respondent. In *Ward v. Scarborough, Supra*, the rule applied was that where the

party making the demand possesses, or is supposed to possess, the power to impose such demand against the party claiming such duress without recourse to the court, and by such demand induced the party claiming duress to do some act he was not legally bound to do contrary to his will, that duress was present. That in such a case, duress might exist, although some measure of relief might be secured by an action in the court. The power conferred on respondent should not be arbitrarily exercised is established by the Texas Decisions. *A. Harris & Co. v. Campell*, (Tex. Civ. App.) 187 S. W. 365; *Atwood v. Fagan*, (Tex. Civ. App.) 134 S. W. 765; *People's State Bank v. Munsey Oil Co.*, (Com. App.) 11 S. W. 508, 509.

The decision in *A. Harris v. Campbell* is typical. In that case a lease provided that the lessee might assign it with the consent of the lessor. The court held that this provision did not confer a right on the lessor to arbitrarily refuse his consent; that if the lessee produced a party who was solvent and not otherwise objectionable to an ordinary person the lessor must give his consent.

The decision places the burden on petitioners to prove that respondent was liable for the Port Arthur operations, and this holding is in conflict with decisions of other courts. *Angle v. Schram*, 109 F. 2d 380; *Standard Accident and Insurance Co. v. Leslie*, 55 S. Supp. 34; *Travelers Ins. Co. v. Drumheller*, 25 S. Supp. 2606; *Lumberman's Mutual Casualty Co.*

v. McIver, 27 S. Sup. 702, affirmed 110 F. 232, Certiorari denied, 311 U. S. 355; *Stoner v. New York Life Ins. Co.*, 311 U. S. 464.

The decision of said circuit court found that petitioners wholly failed to make a case for recovery against respondent of either fraud or mismanagement and fails to apply to the facts in this case, the applicable State and Federal decisions. The applicable local law as set forth in the cases of *Henderson v. San Antonio and J. & G. N. Ry. Co.*, 17 Tex. 56; *Wilson v. Jones*, (Comm. of App.) 45 S. W. 2d 572; *O'Neal v. Weisman*, 88 S. W. 2290; *Thompson v. Shiflett*, 267 S. W. 1030, was not applied. The evidence showed that respondent's agent represented that said letter constituted a Navy demand, and informed petitioner that he had been instructed by Admr. Blandy to come to Texas and chop the individual petitioners' heads off, as to the management of the affairs of said corporation, and informed them that, if they refused said demand, it would result in the Navy cancelling their contracts; and other evidence showed that the statements made by said agent, as coming from Blandy, were incorrect, and that the letter presented was written by the Navy at the request of Respondent, and that said individual petitioners were induced by said statements and the threat that respondent would exercise its powers, under said escrow agreements, to relinquish all control over the Port Arthur plant and submit the performance of said contract to a management committee, dominated and controlled by

respondent's agent and officers. The applicable local law, as shown by decisions referred to, is that if by material false representations, a party is induced to act to his detriment, the party making such representations, upon which the defrauded party acted and which were made to induce him to act, constituted fraud for which redress in law will be granted.

The decisions of the said Circuit Court, that petitioners wholly failed to make out a case for recovery against respondent, failed to apply the applicable local law to the facts in that while the respondent pleaded and claimed an estoppel against petitioners, it was shown that the same circumstances which existed when they were induced to surrender control of said property, continued to exist throughout the operation of said management committee, and therefore its duress continued, as held in *Green v. Hopper*, Tex. Civ. App., 270 S. W. 285, 286, and that under such circumstances, neither ratification or estoppel was available to the person guilty of such duress.

The decision of the Circuit Court of Appeals to the effect that the evidence did not show mismanagement, is contrary to the applicable rules governing the submission of cases to the jury, in that petitioners introduced evidence showing that there was incompetent management and operation, and that under proper management, the loss sustained should, and could have been avoided by proper management, as shown by the testimony of R. C. Armstrong (R. 731, 732, 739, 741, 742, 744).

The judgment of the trial court was clearly erroneous in decreeing, if it did so decree, and the Circuit Court of Appeals erred in affirming that judgment, that the individual petitioners were primarily liable on the notes described in respondent's petition; the liability of George W. Armstrong Sr., on said notes, was clearly that of a guarantor arising from a contract of guaranty written on the back of said notes. *Eller v. Irving*, 265 S. W. 595; *Guaranty Etc. v. Singleton*, (Tex. Civ. App.) 85 S. W. 2d 803; *General Trust Co. v. Manley*, (5th Cir.) 100 F. 2d 993; *Wood v. Canfield Paper Co.*, 119 Tex. 399. This matter is of great importance, as it was contended in the Circuit Court of Appeals that regardless as to whether, as a matter of fact and law, said individual petitioners were primarily liable, that they were bound by the judgment in the declaratory proceeding above referred to. The decision of the Circuit Court of Appeals refused to apply the applicable rule, as stated by this Court in reviewing instructed verdicts.

That in considering an appeal from an instructed verdict the testimony will be viewed in the light most favorable to the party against whom the verdict was instructed and the evidence when considered in that light must plainly show the right of the party for whom the verdict was instructed to have the verdict instructed in his favor. *Chesapeake and Ohio Ry. Co. v. Martin*, 283 S. W. 209; *Corsicana National Bank v. Johnson*, 251 S. W. 68; *Best v. District of Columbia*, 291 U. S. 411; *Associated Press v. U. S.*, 326 U. S. 1.

WHEREFORE Petitioners present copies of the proceedings below as required by the rules, and respectfully pray that a Writ of Certiorari issue out of, and under the seal, of this honorable court, directed to the 5th Circuit Court of Appeals, commanding that Court to notify and send to this Court for its review and determination, a full and complete transcript of the record and of the proceedings of the said U. S. Circuit Court of Appeals 5th Circuit, had in the cause numbered on its docket 11,499, styled Texasteel Manufacturing Co. et al, Appellant v. Seaboard Surety Company, Appellee, to the end that this case may be reviewed and determined by this court as provided for by the statutes of the United States; and the judgments below be

reversed and such further relief as to this court may seem fitting.

Issued at Fort Worth this —— day of March, 1947.

TEXASTEEL MANUFACTURING CO.
GEORGE W. ARMSTRONG, SR.
MARY C. ARMSTRONG
ALLEN J. ARMSTRONG
GEORGE W. ARMSTRONG, JR.
Petitioners

By: Alford McKnight, *Attorney.*
CANTEY, HANGER, McMAHON,
McKNIGHT & JOHNSON
1500 SINCLAIR BUILDING
FORT WORTH, TEXAS

WILLIAM PANNILL
CENTURY BUILDING
FORT WORTH, TEXAS
Of Counsel

APPENDIX A

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

(December 6, 1946)

Before SIBLEY, WALLER, and LEE, Circuit Judges

PER CURIAM: A declaratory judgment was rendered below on May 8, 1945, from which an appeal was taken. Coercive relief in the form of a judgment for the payment of money based upon the declaratory decree was also entered by the Court, in the same case, on January 12, 1946, from which an appeal was likewise taken. The two appeals, by stipulation, having been argued together, we shall dispose of them together.

We conclude: (1) that the Court below had jurisdiction; (2) that the allegations of the complaint made an appropriate case for a declaratory judgment; (3) that the defendants wholly failed to prove either fraud, duress, or mismanagement by Appellee; (4) that the defendants wholly failed to make out a case for any recovery against the Appellee; (5) that the individual defendants were primarily liable on the obligation for which recovery was allowed;

(6) that the corporate reorganization proceedings in bankruptcy pending in the same court did not prevent

the Court below from declaring the rights of the parties and from rendering judgment against the individual defendants; (7) that the granting of a money judgment in the case after the rendition of a declaratory decree was not error; (8) that the judgments of the Court below in both appeals should be and the same are hereby,

AFFIRMED.

APPENDIX B

THE STATE OF TEXAS }
COUNTY OF TARRANT }

BEFORE ME, the undersigned authority, a notary public in and for Tarrant County, Texas, on this day personally appeared A. J. ARMSTRONG, known to me to be a credible person who, being by me first duly sworn, upon his oath deposes and says:

That he is one of the appellants in the above cause pending in the United States Circuit Court of Appeals, Fifth Circuit; that he, said affiant, is president of Texasteel Manufacturing Company and has been in charge of the operation of the Fort Worth plant of said company during the trusteeship of J. Mac Thompson.

That during said trusteeship there were issued under order of the United States District Court for the Northern District of Texas, Fort Worth Division, trustee certificates in the sum of $715,000.00, which were financed by appellee, Seaboard Surety Company.

That $400,000.00 of said certificates, including interest, have been paid by said trustee; that the order of the court directing payment of said certificates also earmarked the assets of Texasteel Manufacturing Company at Port Arthur, Texas, for payment of any balance due the United States Navy on advance payments made by it to Texasteel Manu-

facturing Company on contracts NORD 150, 153 and 171.

That the remaining trustee's certificates in the sum of $315,000.00 and interest have been refinanced with new certificates issued under order of said District Court and said certificates are now held by The Fort Worth National Bank of Fort Worth, Texas; that Seaboard Surety Company is not liable for nor bound for the payment of said certificates, or any part thereof, and that there exists on the part of the Seaboard Surety Company no further liability for any part of said certificates in the sum of $715,-000.00 originally financed by it.

That the amount of the claim of the United States Navy against Texasteel Manufacturing Company over and above credits allowed against the advance payments made to said Texasteel Manufacturing Company on said contracts NORD 150, 153 and 171 does not exceed $18,000.00; that there is in the hands of the trustee of said Texasteel Manufacturing Company and a part of the assets of said Port Arthur division and earmarked by order of said District Court for settlement of said claim of the Navy a sum in excess of $20,000.00.

That there exists no liability, present or contingent, of Seaboard Surety Company on the bonds executed

by it as surety for Texasteel Manufacturing Company and described in its amended petition in this case.

Further affiant saith not.

A. J. ARMSTRONG,
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME by A. J. Armstrong on this 2nd day of August, A. D. 1946.

SEAL

BERTHA ROGERS,
Notary Public in and for
Tarrant County, Texas

APPENDIX C

N.ORD 3

IN REPLY ADDRESS
BUREAU OF ORDNANCE,
NAVY DEPARTMENT,
AND REFER TO
S78/NORD 153

17 June 1943

Navy Department

BUREAU OF ORDNANCE

Washington, D. C.

RESTRICTED

Subject: Contract NOrd-153, dated June 6, 1941, with Texasteel Manufacturing Company for 5″/38 A. A. Common Projectiles.

Sirs:

The subject contract provides for the furnishing and delivery of 114,000—5″/38 A. A. Common Projectiles, to be delivered f.o.b. Naval Ammunition Depot, Lake Denmark, New Jersey, at $12.744 each. It is desired to amend the subject contract to provide for deliveries f.o.b. Contractor's plant, at $11.95 each. Since no deliveries have been made under this contract because you have been shipping under Contract NOrd-171, it is also desired to amend the schedule of deliveries to provide for completion by June 1, 1945. It is necessary that the subject contract be amended accordingly.

Therefore, pursuant to Section 201 of the Act of Congress approved December 18, 1941 (First War Powers Act, 1941), and it being the judgment of the contracting officer that the execution of this amendment will facilitate the prosecution of the war, it is desired to amend Contract NOrd-153 by this letter of change to be identified as Change Letter No. 4, as follows:

Page 2, Article 1. Scope of this Contract. Lines 10, and 12; Change the comma after "Bureau of Ordnance" to a period and delete "at $12.744 each. All projectiles other than test projectiles shall be delivered f.o.b. Naval Ammunition Depot, Lake Denmark, New Jersey." Insert in lieu thereof: *All projectiles other than test projectiles shall be delivered f.o.b. Contractor's plant, at $11.95 each.*

Page 2: After "Deliveries shall be made as follows:" delete "To be completed by 1 July 1942" and insert in lieu thereof: *To be completed by 1 June 1945.*

If the foregoing be acceptable to you, please so indicate on the original and one copy of this letter enclosed herewith, returning them to the Chief of the Bureau of Ordnance, thereby incorporating, em-

bodying and including said change as part of said Contract NOrd-153. The other copy is for your files.

Very truly yours,

W. H. P. BLANDY
Rear Admiral, U. S. NAVY
Chief of Bureau of Ordnance.
Acting under the direction of
the Secretary of the Navy.
H. L. Merring
Captain, U.S.N. (Ret.)
by Direction of the
Chief of the Bureau of Ordnance,
Contracting Officer.

Texasteel Manufacturing Co.
Fort Worth, Texas
ACCEPTED:

.....,1943

TEXAS STEEL MANUFACTURING CO.
By Geo. W. Armstrong, Jr.
(Contractor)

(Enclosed 2 copies of this letter)
CFP/hid

APPENDIX D

(C O P Y)

NAVY DEPARTMENT

RESTRICTED

BUREAU OF ORDNANCE

S78/Nord-171 (Pr2a) Washington, D. C. Oct. 4, 1941

Subject: Contract Nord-171, dated June 21, 1941, with Texasteel Manufacturing Company, for 5"/38 A. A. C. Projectiles. Changes in.

Sirs:

When the above identified contract, Nord-171, was entered into, the Contractor contemplated procuring the steel from external sources, and installing certain facilities with its own, or borrowed, funds.

Due to difficulties in financing, the Contractor has requested this Bureau to provide additional forging facilities by means of a Government ownership type of facilities contract. It is the opinion of this Bureau, based on investigation, that a shortage of forging facilities exists particularly in the southwest, and that an expansion in these facilities is necessary in the interest of National Defense. The estimated cost of the expansion of facilities to be the subject of a government ownership contract is $550,000.00.

In view of the fact that the price under Contracts Nord-150, Nord-153 and the above identified contract

was fixed in contemplation of the Contractor supplying its own facilities, it was agreed between the representatives of the Contractor and the Bureau that the Contractor would decrease the cost of the supplies to be furnished under Contracts Nord-150, Nord-153 and Nord-171 by 9/12 of 25% of the estimated cost of the facilities, or $103,125.00.

For the purpose of convenience, this decrease will be borne, for all three contracts, in Contract Nord-171.

Furthermore, the contract price was based on the price of steel at $72.00 per ton. Due to the placing of the facilities in Port Arthur, there will accrue certain savings in freight. Accordingly, the difference between $72.00 a ton and the weighted average price at Port Arthur, Texas, of the same quality of Government inspected steel will be refunded to the Government.

Due to the delay which will be occasioned by the acquisition and the construction of the facilities, the time within which deliveries are to be completed is extended from July 1942 to October 1942.

Accordingly, pursuant to Article 16, *Changes*, of said contract, it is desired that the above identified Contract Nord-171 be amended as follows:

(1) On the title page (1), change the numeral following the word "amount" from "$2,987,-500.00" to *$2,884,375.00.*

(2) Page 2, Article 1: Line 9, add the following sentence: *The amount to be paid to Contractor shall be reduced by the sum of $103,125.00, and such sum as determined by the Board on Changes to represent a reduction below $72.00 per ton in the cost of steel to the Contractor.*

Line 13, change "July 1942" to *October, 1942.*

If the foregoing is acceptable to you, please so indicate on the enclosed three copies of this letter, returning the same to the Chief of the Bureau of Ordnance, thereby incorporating, embodying and including said changes as a part of said Contract Nord-171.

Very truly yours,

/s/W. H. P. BLANDY
Rear Admiral, U. S. Navy
Chief of Bureau of Ordnance

Texasteel Manufacturing Company
Fort Worth, Texas

ACCEPTED:

TEXASTEEL MANUFACTURING COMPANY
(Contractor)

/s/A. J. Armstrong
10-4-41
LM

APPENDIX E

TEXASTEEL MANUFACTURING COMPANY

Port Arthur Division
Defense Plant

Port Arthur, Texas

NAVY DEPARTMENT
BUREAU OF ORDNANCE

WASHINGTON, D. C.

S87/Nord-153
(Pr2A)

October 6, 1941

Subject: Contract Nord-153, dated June 6, 1941, with Texasteel Manufacturing Company, for 5"/38 A. A. C. Projectiles—changes in.

Sirs:

Pursuant to negotiations had between officials of the Contractor and the Bureau whereby the Bureau is to furnish Certain plant expansions at Contractor's plant which will result in the reduction to the Contractor in the cost of steel below $72.00 a ton, it is desired to amend the above identified contracts as follows:

Page 2, Article 1: Line 12, add the following sentence: The amount to be paid to Contractor

shall be reduced by such sum as determined by the Board on Changes to represent a reduction below $72.00 per ton in the cost of steel to the Contractor.

Line 17, Change "1 July 1942" to *1 October 1942.*

If the foregoing is acceptable to you, please so indicate on the enclosed three copies of this letter, returning the same to the Chief of the Bureau of Ordnance, thereby incorporating, embodying and including said changes as a part of said Contract Nord-153.

Very truly yours,
W. H. P. BLANDY
Chief of Bureau of Ordinance

No.————

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

TEXASTEEL MANUFACTURING COMPANY, ET AL,

Petitioners,

vs.

SEABOARD SURETY COMPANY,

Respondent.

Brief in Support of Petitioners' Petition For Writ of Certiorari to the United States Circuit Court of Appeals For the 5th Circuit

I.

OPINION OF THE COURT BELOW

The opinion of the U. S. Circuit Court of Appeals for the 5th Circuit styled Texasteel Manufacturing Company, Appellant v. Seaboard Surety Company, Appellee, is not yet reported in the Federal Reporter and may be found in the record filed in this Court in this suit. R. 1065.

II.

JURISDICTION

This has been stated under subdivision 2 of the preceeding petition for writ of certiorari to which ref-

rence is here made; and, therefore, will not be restated here.

III.

STATEMENT OF THE CASE

In this cause the plaintiff alleged that the individual defendants procurred money from the Government Naval Bureau to build a facilities plant, but that they misapplied such funds and for their own personal gain also started building a steel mill.

The facts are undisputed that prior to 1941 individual petitioners owned and operated the Texasteel Manufacturing Company and the Texas Steel Company. The undisputed facts are that the Fort Worth plant in performing shell contracts for the Army in every month exceeded its quota and made money during all of its operations conducted by the individual petitioners.

In the late part of 1941, the Naval Bureau approached the president of the Texasteel Manufacturing Company, to get them to make shells for the Navy, and the board was advised that the parties did not have the funds to build the plant, and it would have to be financed by the government and which was agreed to. Being in a rush to get started, the Bureau agreed to advance money on facilities contracts and they started to build the plants. Long before any contracts were entered into for the erection of facilities plants, the Navy advanced $585,000.00 to the

parties to begin operations, the advancements being made on supply contracts. In April, Capt. Bryan introduced A. J. Armstrong to Lt. Comdr. Higgins, and was advised by him that the Navy had equipment that could be used both for the steel mill and the facilities plant, at South Charleston, West Virginia. The parties purchased this equipment on the strength of Higgins recommendation.

On May 6, 1941, the Company wrote the Bureau, estimating the cost of steel plant and facilities plant and advised them as to how much steel they expected to produce. (Defendants Ex. 1, R. 566). On May 10, the Company advised the Board as to the material to be bought for the steel mill. (Defendants Ex. 2, R. 558). On June 5, the Company wrote the Bureau with further reference to the steel mill. (Defendants Ex. 3 and 6, R. 616, 620). Report was made to Capt. Bryan on July, 1941, that the material had been bought for the plants. (Ex. 8, R. 622). On September 13, 1941, Admr. Blandy wrote the Company with reference to the plans and specifications for the facilities plant, approved by the Navy without consulting these petitioners, such letter stating that they should be in accordance with the steel mill, the plans of which had been approved on August 29, 1941, (Ex. 9, R. 626). On October 7, 1941, Admr. Blandy wrote to the Company advising them that on account of the steel mill, petitioners would be able to make steel cheaper, the cost to the Navy should be reduced below $72.00 per ton, in accordance with the cost of making it, and this letter was made a part of the contract. (Ex. 12, R.

627, R. 556 to 569, inclusive; 570 to 574, inclusive; 616 to 622, inclusive; Def. Ex. 3, 4, 5, 6, 7, 8 and 9; Def. Ex. 28, R. 578). Since January, 1942, the funds advanced had been expended on both plants, and the Navy approved plans of Beyster and Company were found to be inadequate and the Navy abandoned the steel mill project.

These facts and figures detailed in Paragraph 14 of the answer of these parties was stricken out by the Court on motion of Seaboard Surety Company. Not one word of evidence was introduced contradicting these letters, and the sworn testimony of the president of the company as to the steel mill, but it was urged that the building of the steel mill was fraud.

In April, 1942, the Naval Bureau, having abandoned the steel mill, the Armstrongs attended a conference with the Bureau and offered to abandon the work and pay the Navy all money advanced by it. On motion of the Seaboard Surety Company most of paragraph 11, and all of paragraphs 14, 26 and 21, were stricken as immaterial to the issues involved.

The testimony above mentioned not only made a issue of fact, if they care to contest it, but it was all the testimony of those parties. The bare allegation that there was no agreement for a steel mill, or that funds were misappropriated, are not supported by any character of proof. The record shows that these two plants were to be built by the defendants and constructed at no profit to themselves. The trial court

seemed to think that none of the facts introduced by plaintiffs in support of its petition for declaratory judgment, could be rebutted by petitioner.

IV.

SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals erred in holding that the District Court in the exercise of its general jurisdiction, and not sitting as a bankruptcy court, had jurisdiction to entertain this suit against the corporate petitioners for an adjudication of the liability of said corporation on the notes described in respondent's petition, and such jurisdiction to decree said corporate petitioner liable for principal, interest and attorney fees of said note; said corporation, at said time, being involved in certain reorganization proceedings pending in the bankruptcy court for the same District, without the consent of said bankruptcy court.

2. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction to render judgment decreeing the liability of the corporate petitioner upon certain notes described in respondent's petition when said corporation was involved in reorganization proceedings then pending in the Bankruptcy Court without pleading or proof that said claim had been filed in such reorganization proceedings within six months.

3. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction to render a

declaratory judgment declaring that the respondent was not liable to said corporate petitioner on its claim that respondents had by fraud and duress, taken over the management and the performance of certain contracts between corporate petitioner and the Naval Bureau, when said corporate petitioner was involved in certain bankruptcy proceedings then pending in the same district without the consent of the Bankruptcy Court.

4. The Circuit Court of Appeals erred in holding that the allegation of respondents' complaint, in the district court, made an appropriate case for a declaratory judgment, and in affirming said judgment, when the record showed that the only grounds alleged by respondent for such judgment, was that it was necessary that it be advised as to the validity of certain trustee's certificates in said reorganization proceedings which it had purchased in order that it might determine whether it should further finance the operation of the Port Arthur plant. The records show, that since said trial, the contract between the Navy and corporate petitioner had been performed or cancelled, and respondent relieved of all liability on the bonds of said corporate petitioner, and that said trustee's certificates had been paid or refinanced, and that respondent had no further connection with said officer or said reorganization proceedings, and the facts relating to liability or non-liability of petitioners on said note has already transpired, and the facts as to respondent's liability, for the operation of said plant, had already transpired and there was nothing in the

evidence showing an existing or imminent invasion of respondent's rights by petitioners which would result in injury to it.

5. The Circuit Court of Appeals erred in holding that the burden of proof was on petitioners to prove either fraud, duress or mismanagement, by respondent because the burden of proof was on respondent, who sought a declaratory judgment against petitioners decreeing that it had not been guilty of any fraud, duress, or coertion, and that it was nct responsible for mismanagement of the operation of the Port Arthur plant, and it had not mismanaged said operation.

6. The Circuit Court of Appeals erred in holding that the evidence was insufficient to raise an issue either of fraud or duress or mismanagement by respondent in the operation of the Port Arthur plant.

7. The Circuit Court of Appeals erred in affirming said declaratory judgment based on instructed verdict, and in holding that petitioners wholly failed to prove fraud by respondent, because the burden was on respondent to prove the allegations of its petition for declaratory judgment, and the evidence in the case raised the issue of fraudulent representations on the part of respondent's agent O'Neal, and that petitioners were induced thereby to surrender the control of said Port Arthur plant operation to a management committee.

8. The Circuit Court of Appeals erred in affirming the declaratory judgment based on an instructed

verdict, and in holding that Petitioners had failed to prove duress in the appointment of a management committee because the evidence showed that respondent's agent presented the petitioners a letter from the Navy demanding the removal of certain of the petitioners from any part in the management of the affairs of the corporate petitioners with a threat, that if they presisted in such refusal that respondent would have no recourse but to proceed under its powers in certain escrow agreements of March, 1942, and remove said petitioners from control of the affairs of said corporation and that said individual petitioners accepted the alternative of a management committee, rather than be ousted from control of said corporation; that said demand was unlawful, in that said contract was not in default, and petitioners were in no way responsible for the delay in the execution thereof.

9. The Circuit Court of Appeals erred in holding that petitioners failed to prove any case for recovery against respondent because the evidence showed that after the appointment of the management committee that the operations at Port Arthur were dominated and controlled by respondent's agents and that the plant was operated in a negligent, inefficient manner, and that if it had not been so operated, losses of approximately over a million dollars would have been avoided.

10. The Circuit Court of Appeals erred in affirming the judgment of the District Court, because there was no evidence authorizing an instructed verdict in

favor of respondent on the issue of estoppel and ratification, in that the evidence showed that respondent's power under said escrow agreement of March, 1942, continued through the period of operation of said Port Arthur plant, and, therefore, the duress continued for the same period and further because there was no evidence showing a ratification or estoppel.

11. The Circuit Court of Appeals erred in holding individual petitioners were primarily liable on the notes in question.

V.

ARGUMENT AND AUTHORITIES

The Circuit Court of Appeals in its per curiam opinion gave no reason for its decision. It stated tersly and succinctly its bare conclusions as to the points presented on the appeal. It becomes necessary, therefore, to briefly state the reasons urged by petitioners in support of the points advanced in the foregoing specifications of errors.

JURISDICTION OF DISTRICT COURT

As the above point which involved a determination of the question as to the effect of the pendency of the reorganization proceedings on the jurisdiction of the district court, we have cited in the reasons presented for granting the writ, numerous cases, both by this court and the circuit court of appeals, holding that the jurisdiction of a bankruptcy court is exclusive. A leading case on this subject is the

decision in *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, which involved a claim of equitable rights by the plaintiff to have a fund, in the hands of the trustee in bankruptcy, applied to certain labor claims for which the plaintiff in that suit was liable. This court said: "We think it is a necessary conclusion from this and other provisions of the act that the jurisdiction of the Bankruptcy Court in all situations on proceedings in bankruptcy is intended to be exclusive of all other courts and that such proceedings including among others all matters of administration." This exclusive jurisdiction of the bankruptcy court applied to a district court exercising common law or equitable or statutory jurisdiction other than courts of bankruptcy, although in the same district and presided over by the same judge. *Moore v. Scott*, 55 F. 2d 863. This rule has been applied to various proceedings. In *Moore v. Scott* the rights of the district court sitting as a court of equity, to fix the compensation of a receiver appointed by it, when the said judge was sitting in a Bankruptcy matter and had adjudged the corporation a bankrupt was denied. Numerous other cases applying the same rule of varying facts, citations are in the margin.

Hanna v. Bricton Mfg. Co., 62 F. 2d 139;
Re Trustee System Etc. Co. v. Wilson, 85 F. 2d 467;
Silverberg v. Ray Chain Store, 54 F. 2d 650;
Taylor v. Steinberg, 293 U. S. 490;
New Lamp Chimney Co. v. Ansonia Brass, Etc. Co., 91 U. S. 656;

U. S. v. Wood, 263 U. S. 680;
Graham v. Boston, Etc. Co., 118 U. S. 161.

This exclusive jurisdiction applies to reorganization proceedings brought under the Chandler Act. *Re Plankington*, 138 F. 2d 221.

The provision of the bankruptcy act provided that claims against the bankrupt estate should not be proved subsequent to six months period after adjudication. These statutes are applicable to reorganization proceedings. These provisions are mandatory. See authorities cited in Margin.

Sect. 57n, Amended May 27, 1926, Chap. 406 Sect. 13, *11 U.S.C.A.* Sect. 93n *11 U.S.C.A.* Sect. 207;
In Re Wenor Millinary Co., 1 F. 2d 385; affirmed 4 F. 2d 77;
In Re Britt, 52 F. 2d 636;
In Re Aruerbach, 53 F. 2d 482;
8 C. J. S., Sect. 426;
In Re Clayton Magazines, 77 F. 2d 852;
In Re Plankington, 138 F. 2d 221;
In Re Park Beach Hotel Bldg. Corp., (C. C. A. NY) 96 F. 2d 886; (Cert. denied 305 U. S. 638).

In addition *Sect. 596, Title 11 U.S.C.A.* gives Bankruptcy Court sole jurisdiction to allow claims and may exercise its equitable power in allowing the amount thereof. *In Re Nor Car Mfg. Co.*, 109 F. 2d 407 (Cert. denied) 310 U. S. 625.

The decree of the declaratory judgment was that said corporation was liable for the full amount, principal, interest and attorney fees on the notes aggregating more than $600,000.00 including approximately $60,000.00 attorney fees. This judgment will leave nothing for the bankruptcy court to decide as to amount of attorney fees and the only function will be to make a mathematical calculation of the amount of principal, interest and attorney fees in said note.

The points made by petitioners as to the sufficiency of the allegations for declaratory relief are based upon the contention that such relief is not available to merely determine the liability of petitioners as to the notes sued on or the liability vel non of respondents with respect to operation of the Port Arthur plant; that such cause of action is not within the purvue of the declaratory judgment act. The cases relied on by the respondent are those in which there was sought an adjudication as to a threatened liability because otherwise if the matter was postponed until an ordinary action was brought by a party claiming liability, the plaintiff in such declaratory proceedings would suffer a penalty. This, as we understand the case, was the reason underlying the decision of the court in *Aetna Life Ins. Co. v. Hayworth*, 300 U. S. 227. In that case the plaintiff was threatened with liability on an insurance policy if liable and was sued it would be liable for interest, penalty and damages. It was consequently held by this court that it was proper

for the insurance company to have its liability determined so that if it was found liable it could discharge said liability without suffering the penalties referred to. In this case no such a situation is presented. In the first place, there was never any question as to the liability of the petitioner corporation for trustee's certificate issued and purchased by respondent in said reorganization proceeding. Respondent was not entitled to have the court advise it as to whether it might safely purchase such certificates issued in the future. The declaratory judgment could be no stronger than the order of the Court directing issuance of the certificates. When the case was submitted to the circuit court of appeals no Trustee's certificates were held by respondent. They had either been paid or refinanced and there was no liability existing on any of the surety bonds. The only thing remaining was the question of liability of respondent for operation of the Port Arthur plant. The cases seem to hold that Sect. 400 U.S.C.A. Title 28 was not enacted for the purpose of deciding causes of action which under the prevailing rule at the time it was enacted could and were being settled in the courts. Some of the cases so holding are cited in the margin:

1 C.J.S. Actions, Sec. 18, p. 1028, 17 Fed. Supp. 930;

New Discoveries v. Wisconsin Alumni Research Foundation, 13 Fed. Supp. 596 (Reversed on other grounds but approved as to this issue);

1 C.J.S. 17, 1015;

Duart Mfg. Ltd. v. Philad., 31 Fed. Supp. 549;

Agnell v. Schram, 109 F. 2d 380;
Coffman v. Breeze Corporation, 322 U. S. 316;
Ashwander v. Valley, 297 U. S. 288;
Alabama v. Arizona, 291 U. S. 286;
Tennessee Coal and Iron Co. v. Muscoda Local, 137 F. 2d 176;
Anderson on Declaratory Judgments, pp. 17-36, 51;
Borchard on Declaratory Judgments, pp. 81-88.

THE ERROR OF THE TRIAL COURT IN INSTRUCTING THE VERDICT

It is submitted that under the brief statement shown above the trial court should have submitted to the jury issues of fact raised by the evidence as to whether consent of individual petitioners George W. Armstrong Sr. and Allen J. Armstrong agreeing to the appointment of a management committee for the operation of the Port Arthur plant was procured by:

(a) fraud;

(b) duress on the part of respondent's agents;

(c) whether respondent's agents controlled the operation of said plant under such management committee; and

(d) whether such operations were negligent or inefficiently conducted resulting in the loss of over One Million Dollars.

The evidence relating to these matters will not again be repeated but it cannot be gainsaid that said petitioners were induced against their will to agree to a management committee by the unlawful demand of respondent's agent coupled with the threat to take over the control of said corporation above referred to at least to the extent that said evidence raised an issue of fact with respect thereto.

It is submitted that the evidence summarized above brings this matter clearly within the rule announced in *Ward v. Scarborough*, (Tex. Com. App.) 236 S. W. 434. This rule has been stated in the petition for certiorari. In that case the plaintiffs claimed duress in the execution of a certain deed made by them to E. J. Ward and false representations inducing the execution of such conveyance. The alleged duress consisted of facts that there being a lien on the premises conveyed held by John Mosley for whom John Ward was trustee in certain deed of trust or mortgages securing said indebtedness and also agent of said Mosely in respect to said indebtedness; that John Ward agreed orally with the plaintiffs to waive the right to declare the indebtedness due and to extend the time of payment for one year to enable the plaintiff to sell the land for its true value; that plaintiffs then entered into a contract for the sale of the land in question at $6.00 per acre; that said John Ward and E. J. Ward conspired to force a sale of said premises to them for less than the real value and notified the purchaser in said contract that the land was in fact worth less at $3.00 per acre and induced said prospective purchaser to refuse to carry out his

agreement to purchase said property; then that said Wards threatened plaintiffs with immediate foreclosure of said deed of trust and mortgage unless the entire indebtedness was paid the next day and threatened to advertise said land for sale to pay such indebtedness but offered to purchase said land at $4.50 per acre and that on account of said threats and duress plaintiffs were compelled to accept and did accept said offer by E. J. Ward and conveyed the land to him. A judgment was rendered in favor of the plaintiffs establishing that the conveyance was the result of duress and fraud and the court of civil appeals and the commission of appeals and the supreme court based upon the opinion of its commission affirmed said judgment and announced the rule that where one party has the power to sell the property of another and threatens to sell said property in a way to sacrifice said property or inflict great or irreparable injury if compliance with the unlawful demand is refused and by such threat induced the party to act contrary to his will that duress is constituted and this although some measure of relief or redress might have been secured by an action in court. The court also held that the conspiracy of the Wards constituted a breach of the fiduciary obligation relationship owing by him to the Wards in the deed of trust. After reviewing the facts, the court stated, "The allegations show a willful fraudulent scheme to reduce defendant to a state of financial helplessness and distress and force them to part with their property against their will for a grossly inadequate price or in the alternative to suffer an almost certain loss of their equity therein."

The evidence detailed above brings this case squarely within the rule just referred to. Respondent had the power under the escrow agreements to take charge of the stock of said corporations owned by petitioners and to prevent the exercise of either corporation of any corporate functions. It threatened to use this power if petitioners did not comply with the Navy demand. While respondent did not have the legal right to take over the affairs of said corporation and to oust petitioners from any control therein it had the power to do so. The threat to use this power, under the evidence presented by petitioners induced them to surrender the operation of the Port Arthur plant to a management committee as the only alternative to having complete control of said corporation taken from them. (R. 67, 613, 953). This raised the issue of duress. The fact that they might have obtained some measure of relief in the court did not relieve the transaction of its iniquity. Petitioners' evidence also raised the issue that they were in no manner responsible for the delay in the execution of the contract; they entered into the shell making contracts upon the explicit assurance on the part of the Navy representatives that an integrated steel mill and facilities plant would be government financed and when there was delay in procuring government finances the Navy agreed to, and did extend the time for the period of said contract and agreed to furnish the money for the erection of the needed facilities. The plans and specifications were approved by the Navy without consultation with petitioners. These plans as well as the machinery sold by the Navy to

the petitioners for that purpose were inadequate. This was admitted by Navy Representatives and new plans were called for and furnished within the time designated by the Navy Bureau. These plans called for an expenditure of an additional $880,000.00. The individual petitioners then appeared before the Naval Board and agreed if the situation was not satisfactory to cancel the contract and reimburse the Navy for any expenses but instead of this, an agreement was concluded whereby the Navy would furnish the needed capital and petitioners should proceed to finish erection of the plant and carry out the contract, the Navy to receive one-half of the profits to the sum of $400,000.00. Following this specific agreement in April, 1942, and without notice to petitioners Respondent presented the Navy demand for the removal of George W. Armstrong, Sr., and Allen J. Armstrong and their superintendent Foster from any responsibility in the affairs of the corporate petitioner and respondent's agent reported to petitioners that the Navy demanded that respondent's agent proceed to Fort Worth, Texas, and chop their heads off and said agent did as the Navy requested. Said petitioners were without previous notice confronted with this demand and the threat referred to and accepted in the alternative the management committee.

Respondent should not be excused because the plan to oust said petitioners may have originated in the Navy Department. The Navy had no arbitrary right to oust petitioners and neither did respondent. This was stated to Admiral Blandy on June 2, 1942. Such

right could not be conferred upon the Navy by proof of the declaration of its officers and representatives had out of the pressure of petitioners.

The court filed findings of fact and conclusions of law some time after the verdict was instructed. We do not find in the rules any precedent for such action. The very term "findings of fact" denotes the decision of the trial judge as to the facts when the evidence is conflicting. Findings of fact are provided for in the rules only where the case is tried before the court and without the intervention of the jury, therefore, such findings of fact can only furnish the reason for the instructed verdict. An appellate court cannot accept such findings in the review of a peremptory charge when the evidence is conflicting. In this case, the evidence and not the court's findings of fact must be looked to to see whether an issue was raised. The court in said findings of fact found that petitioners were not induced by any act of respondent to consent to such management committee and that respondent did not conceal from petitioner any fact which should have been disclosed. This finding certainly ignored the conflict in the testimony. Petitioners testified to the threats and that their consent was induced thereby and respondent's agent and witness O'Neil admitted he did not disclose any of the conversations or the letter of June 5, to petitioners until he came to Fort Worth about the 11 or 12 of June, 1942, and it was admitted that when the demand was presented to petitioners it was more than once refused. The evidence raised the issue that management committee was agreed to

only after petitioners were induced to believe that their failure to do this would result in their property being taken over and the operation of said plant taken away from them by respondent. The court further finds that petitioner knew prior to June 2, that said Bureau did not consider the two Armstrongs whose removal was demanded competent to manage said shell making plant at Port Arthur and that such belief was based upon reports made to Naval Bureau by its inspectors. There is not one word in the evidence which showed that petitioners had any knowledge of said reports until they were introduced on the trial of this case. They testified that on April 5, 1942, the representatives of the Navy agreed to advance the additional funds of approximately One Million Dollars for the completion of the plant and its operation by petitioner and were not contradicted by any testimony. If it had been petitioners' testimony it would have raised an issue of fact. In the face of these facts the court certainly could not find that the testimony was uncontradicted. The finding that petitioners knew, on June 26, the Navy considered them incompetent and unreliable is not based on undisputed evidence. If the Navy had so considered, it would not have made the agreement of April 5th.

It is further submitted that an issue was raised as to respondent's violation of its duty as fiduciary, the burden was on it to show that it had discharged its duty to petitioners. The escrow agreement conferred upon respondent almost unlimited control of the affairs of the corporate petitioner. This power should

not, and could not, legally be exercised except for cause yet this agreement gave respondent power to control and dominate the affairs of said corporation absolutely. This must be held to have created a fiduciary relationship. The facts bring the case within the rule applied in Texas. *Peckham v. Johnson*, 98 S. W. 2d 408, 416 idem. 132 Tex. 148, 120 S. W. 2d 786.

That the duty though imposed was not performed by respondent's agent is manifest from this record. It did not send a copy of the Navy letter of May 21 (R. 817) to petitioners. This letter recites that frequent conferences concerning affairs of the corporation were had between respondent's agent and Naval officers. What these conferences were is not disclosed. Respondent introduced no evidence of lack of knowledge of adverse reports of Navy representatives neither asked the Navy upon what it based its arbitrary demands. No notice was given petitioner of what transpired at the conference of June 2, nor the letter of June 5, nor the letter of June 6 until about the 11th of June. In said conference of June, 1942, the Admiral was not advised that if he would telephone the proper officials of the War Department he would learn what the respondent knew then—that the charges made in said report were without foundation and that there was no ground to question the honesty and integrity or business ability of petitioners. Respondent, of course, would not have executed bonds as surety of approximately Two Million Dollars for corporate petitioner without a most rigid investigation resulting in full knowledge of the competency, honesty and in-

tegrity of individual petitioners in the management and control of the affairs of the corporate petitioner. It would not be presumed that Blandy would have persisted in said demand if he had been informed of the true facts and circumstances surrounding the execution of said contracts and the further fact that just prior to this demand that said Naval Bureau made an agreement to advance the money to complete said facilities planned and for its operation by the then managing officers who were George W. Armstrong, Sr., Allen J. Armstrong and John Foster. Respondent requested the court to submit the issues of fraud and duress and the issue as to the failure to perform its duty to the jury. (R. 135).

The ex parte reports of the agents of the Navy admitted over the objections of the petitioners as "hearsay" and which reports are based upon hearsay was refuted by the testimony of Allen J. Armstrong, the substance of which has heretofore been stated. The main complaint was concerning the failure to complete the steel mill. This was purely the fault of the Navy. The original plan initiated by Navy representatives was to build an integrated steel and facilities plant and petitioners began the undertaking with that understanding and spent over $200,000.00 of their own funds and there is hardly a correct statement in all of the charges made against petitioners. These reports should not have been admitted and could not in view of the record be considered as destroying the rights of petitioners to have the fact issues submitted to a jury.

If there was an issue of estoppel in the case it was only an issue of fact. There was no pleading or proof that respondent changed its position by reason of any act of petitioners after the management committee was formed. This is a necessary element of an estoppel. *Great Plains Oil and Gas Co. v. Foundation Oil Co.*, 137 Tex. 324, 153 S. W. 2d 452, 459; *Oklahoma v. Texas*, 268 U. S. 252. The resolutions of the board of directors with respect to the operation of the Port Arthur plant by the corporate petitioner are not the acts of said corporate petitioner but such resolutions were the act of respondents because such resolutions did not take effect until approved by the respondents and until that approval was had such corporate acts had no existence, when approved by respondent, it then became the author and could not put the responsibility for such acts on petitioners. Estoppel is based upon false representations which induce the party claiming the estoppel to act to his injury.

Again, the escrow agreement remained in effect and the corporations were powerless to do anything except with the consent of respondent. Therefore, the same power, the threat of which was used to put the affairs of said corporation in the hands of a management committee was still possessed by re-

spondent and as long as the circumstances which brought about the duress continued there could be neither ratification nor estoppel. This is the rule in Texas which is applicable to the issues in this case. *Green v. Hopper*, (Tex. Civ. App.) 270 S. W. 286. There was no pleading or any ratification. The trial court did not instruct a verdict in favor of respondent on the ground of estoppel. (R. bottom of page 1000) (R. bottom of page 1002) (R. Middle of page 1004). The Circuit Court of Appeals did not affirm the judgment on the ground of estoppel or waiver, but on the ground of failure of proof on the part of petitioners.

VI.

CONCLUSION

Petitioners, therefore, respectfully submit that the court was without jurisdiction as stated above and that the judgment should be reversed for further proceedings in accordance with the opinion of this Honorable Court. If, however, they be mistaken as to this, then petitioners submit that they have been denied a trial by jury on controverted issues of fact and that the cause should in any event be remanded to the district court with instruction to

submit the contested issues of fact as to fraud, duress and mismanagement to the jury along with any other material issues of fact which the court might find from an inspection of the record.

Respectfully submitted,

TEXASTEEL MFG. CO.
GEORGE W. ARMSTRONG, SR.
MARY C. ARMSTRONG
ALLEN J. ARMSTRONG
GEORGE W. ARMSTRONG, JR.

Petitioners

BY:
ALFRED McKNIGHT
1500 SINCLAIR BUILDING
FORT WORTH, TEXAS
Attorney for Petitioners

CANTEY, HANGER, McMAHON,
McKNIGHT & JOHNSON
1500 SINCLAIR BUILDING
FORT WORTH, TEXAS

WILLIAM PANNILL
CENTURY BUILDING
FORT WORTH, TEXAS
Of Counsel